

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRUCE WOLOSKY,

Petitioner,

vs.

BENEDITTI, *et al.*,

Respondents.

3:08-cv-602-RCJ-RAM

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Bruce Wolosky, a Nevada state prisoner. The petition filed in the above-captioned case was consolidated with an identical petition filed in case number 3:08-cv-610-LRH-VPC. (Docket #10). The consolidated petition challenges theft convictions entered in March 2006, in the Eighth Judicial District for the State of Nevada, case numbers C-215290 and C-215291, against petitioner Bruce Wolosky.

On December 8, 2009, this Court granted respondents' motion to dismiss, finding that Grounds 6 and 7 of the federal habeas petition are unexhausted. (Docket #35). The Court gave petitioner the option of abandoning his unexhausted claims and proceeding on his exhausted claims, or in the alternative, to seek a stay under *Rhines v. Weber*, 544 U.S. 269 (2005). (Docket #35).

Petitioner has filed a motion for reconsideration of this Court's order of December 8, 2009. (Docket #36). Where a ruling has resulted in final judgment or order, a motion for reconsideration

1 may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil
2 Procedure 59(e), or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School*
3 *Dist. No. 1J Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993), *cert. denied* 512
4 U.S. 1236 (1994). Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or
5 order for the following reasons:

6 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
7 discovered evidence which by due diligence could not have been
8 discovered in time to move for a new trial under Rule 59(b); (3) fraud
9 (whether heretofore denominated intrinsic or extrinsic),
10 misrepresentation, or other misconduct of an adverse party; (4) the
11 judgment is void; (5) the judgment has been satisfied, released, or
discharged, or a prior judgment upon which it is based has been
reversed or otherwise vacated, or it is no longer equitable that the
judgment should have prospective application; or (6) any other reason
justifying relief from the operation of the judgment.

12 Motions to reconsider are generally left to the discretion of the trial court. *See Combs v. Nick*
13 *Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a motion to reconsider,
14 a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its
15 prior decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal.
16 1986), *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9th Cir. 1987). Rule 59(e) of
17 the Federal Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be
18 filed no later than 10 days after entry of the judgment." Furthermore, a motion under Fed. R. Civ. P.
19 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is
20 presented with newly discovered evidence, committed clear error, or if there is an intervening change
21 in the controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001), *quoting McDowell v.*
22 *Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999). In the instant case, petitioner has not met the
23 standard for reconsideration under either Rule 59(e) or Rule 60(b). The motion for reconsideration
24 (Docket #36) of the Court's December 8, 2009 order is denied.

1 Petitioner has also filed a motion for issuance of a stay and abeyance order, so that he might
2 return to state court to exhaust the unexhausted grounds of his habeas petition. (Docket #37).

3 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the
4 discretion of the court to facilitate habeas petitioners' return to state court to exhaust claims. The
5 *Rhines* Court stated:

6 [S]tay and abeyance should be available only in limited circumstances. Because
7 granting a stay effectively excuses a petitioner's failure to present his claims first to
8 the state courts, stay and abeyance is only appropriate when the district court
9 determines there was good cause for the petitioner's failure to exhaust his claims
10 first in state court. Moreover, even if a petitioner had good cause for that failure,
the district court would abuse its discretion if it were to grant him a stay when his
unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An
application for a writ of habeas corpus may be denied on the merits, notwithstanding
the failure of the applicant to exhaust the remedies available in the courts of the
State").


11 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t likely would be an abuse of
12 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner
13 had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious,
14 and there is no indication that the petitioner engaged in intentionally dilatory litigation
15 tactics." *Id.* at 278.

16 In the instant case, petitioner asks this Court to stay the action so he can return to
17 state court to exhaust his unexhausted claims. Petitioner has provided no argument to
18 excuse the failure to exhaust, as required by *Rhines v. Weber*, 544 U.S. 269. Petitioner has
19 not shown good cause for why he failed to raise the unexhausted grounds at some point
20 prior, during the state proceedings. This Court finds that petitioner has not demonstrated
21 good cause under *Rhines* for the failure to exhaust Grounds Six and Seven of his federal
22 habeas petition.

23 **IT IS THEREFORE ORDERED** that petitioner's motion (Docket #36) for
24 reconsideration is **DENIED**.

IT IS FURTHER ORDERED that Grounds Six and Seven of the federal habeas petition are **DISMISSED**.

IT IS FURTHER ORDERED that petitioner's reply to the answer **SHALL BE FILED** no later than **forty-five (45) days** after being served with the answer.


UNITED STATES DISTRICT JUDGE